

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2003-000482-001 DT

04/07/2004

HONORABLE MICHAEL D. JONES

CLERK OF THE COURT
P. M. Espinoza
Deputy

FILED: _____

DEAN THOMPSON

JOHN M PEARCE

v.

STEPHEN A OWENS (001)
ARIZONA STATE DEPARTMENT OF
ENVIRONMENTAL QUALITY (001)

MICHELLE ANNE DE BLASI

OFFICE OF ADMINISTRATIVE
HEARINGS

MINUTE ENTRY

Dean Thompson dba Thompson's Muffler ("Thompson's Muffler") appeals from a final administrative decision of Stephen A. Owens ("Director") in his capacity as Director of the Arizona Department of Environmental Quality ("ADEQ") disallowing recovery of certain costs from the Underground Storage Tank ("UST") State Assurance Fund ("SAF"). The Director's decision rejected a recommended decision issued by the Administrative Law Judge ("ALJ") in favor of Plaintiff on the costs at issue.¹ This Court has jurisdiction of this administrative appeal pursuant to the Administrative Review Act, A.R.S. § 12-901, et seq. This case has been under advisement and the Court has considered and reviewed the record of the proceedings before ADEQ, the Office of Administrative hearings ("OAH") and the memoranda submitted by counsel.

1. Factual and procedural background

Plaintiff owns an improved parcel of property in Holbrook, Arizona where one or more USTs were discovered and a "release" as defined by statute occurred.² Despite being neither an owner

¹ *In the Matter of: Thompson's Muffler*, Office of Administrative Hearings, Docket No. 02A-F122-DEQ ("Final Decision"), April 11, 2003. Recommended Decision of the Administrative Law Judge ("ALJ") March 11, 2003 ("ALJ Decision").

² ALJ Decision, Findings of Fact, ¶ 6; A.R.S. 49-1001(15) defines "release" with respect to UST. Despite being neither an owner nor operator of the UST on its site, Plaintiff elected to voluntarily remove/close the UST and undertake "corrective action,"

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nor operator of the UST on its site, Plaintiff elected to voluntarily remove/close the UST and undertake “corrective action.”³ Plaintiff is eligible to receive reimbursement from the State Assurance Fund (“SAF”) for certain costs incurred for the voluntary UST corrective action it undertakes provided that ADEQ determines the activities undertaken by Plaintiff meet applicable requirements.⁴ The Director of ADEQ is required to administer funds for the cleanup of underground storage tanks from the SAF.⁵

Plaintiff submitted to ADEQ a Site Characterization Work Plan which resulted in reviews and exchanges between Thompson’s Muffler and ADEQ during the first six months of 1999. In the plan, Thompson’s Muffler proposed to do monthly water level measurements at the site.⁶ ADEQ and plaintiff disagreed about the frequency of the water level measurements. After rejecting the proposed monthly measurements in the plan on two occasions, Thompson’s Muffler appealed the pre-approval determination. ADEQ reconsidered and in June of 1999, ADEQ pre-approved eight monthly water level monitoring events.⁷ On August 16, 2000, ADEQ approved Thompson’s Muffler’s Site Characterization Reports submitted regarding the site.⁸ Plaintiff continued to conduct monthly measurements for several months after the expiration of the pre-approved eight monthly measurements.⁹ After approval of the Site Characterization Report, ADEQ ceased further payment of Thompson’s Muffler’s monthly water level measurement claims.¹⁰ ADEQ rejected reimbursement for five monthly measurements.¹¹ ADEQ determined that five monthly groundwater level measurements taken by Thompson’s Muffler did not meet the statutory requirements of A.R.S. § 41-1005(D), were not justified and would not be reimbursed by the SAF.¹² Thompson’s Muffler appealed ADEQ’s decision.

An administrative hearing was held and the ALJ issued his Recommended Decision on March 11, 2003.¹³ There, the ALJ concluded that ADEQ improperly denied the reimbursement sought by Thompson’s Muffler for the five claims for monthly water level measurement at the Thompson’s Muffler site and recommended that the Director direct the SAF to reimburse plaintiff for the five claims.¹⁴ The ALJ’s Recommended Decision and the record of the proceedings was forwarded to the Director for review. The Director issued a Final Decision and

³ ALJ Decision, Findings of Fact, ¶ 7.

⁴ ALJ Decision, Applicable Law, ¶¶ 3-4.

⁵ ALJ Decision, Applicable Law, ¶ 1; A.R.S. § 49-1036.

⁶ Final Decision, pp. 1-2.

⁷ ALJ Decision, Findings of Fact, ¶ 14.

⁸ ALJ Decision, Findings of Fact, ¶ 23. “A Site Characterization Report is a document that purports to delineate the full extent and degree of contamination in the soil and groundwater at the UST site.”

⁹ ALJ Decision, Findings of Fact, ¶ 24.

¹⁰ ALJ Decision, Findings of Fact, ¶¶ 23, 24.

¹¹ ALJ Decision, Findings of Fact, ¶¶ 9, 24. The five rounds of monitoring at issue occurred during November 2000, January 2001, February 2001, April 2001, and May 2001.

¹² The claim for each monitoring totaled \$2,500. ALJ Decision, Findings of Fact, ¶ 10.

¹³ ALJ Decision.

¹⁴ ALJ Decision, Conclusions of Law, ¶ 7; and Recommended Decision.

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Order rejecting the ALJ's Recommended Decision on April 11, 2003.¹⁵ The Director concluded that "the evidence shows the monthly water level measurements were not reasonable or necessary under the specific circumstances at the site."¹⁶ Plaintiff timely filed this administrative review action from the Director's Final Decision and Order.

2. Standard of Review

The issues in this case involve the question whether the evidence is sufficient to support the Director's Final Decision and Order rejecting the ALJ's Recommended Decision and whether that Decision is otherwise contrary to law. On appeal of an administrative agency's decision pursuant to the Administrative Review Act, the Superior Court determines whether the administrative action was supported by substantial evidence, was contrary to law, was arbitrary and capricious, or was an abuse of discretion.¹⁷ As to questions of fact, this Court does not substitute its conclusion for that of the administrative agency, but reviews the record only to determine whether substantial evidence supports the agency's decision.¹⁸ Questions of statutory interpretation involve questions of law and the reviewing court is not bound by the administrative agency's conclusion.¹⁹ The reviewing court applies its own independent judgment to questions of statutory interpretation.²⁰

3. Discussion

Thompson's Muffler contends that the Director erred in three respects. First, Plaintiff argues that the Director disregarded the administrative record. Second, Plaintiff argues that the Director misapplies the law in that he relied on a guidance manual that the ALJ had determined was inadequate and unenforceable. Third, Plaintiff contends that the Director failed to justify his rejection of the ALJ Recommended Decision with findings of fact and conclusions of law or citations to the record, all in violation of A.R.S. § 41-1092.08(B).²¹

¹⁵ Final Decision.

¹⁶ Final Decision, p. 2.

¹⁷ A.R.S. § 12-910(G); *Siegel v. Arizona State Liquor Board*, 167 Ariz. 400, 401, 807 P.2d 1136 (App. 1991).

¹⁸ *Petrlas v. Arizona State Liquor Board*, 129 Ariz. 449, 452, 631 P.2d 1107 (App. 1981). This case was decided as a purely legal question. The few background facts relied upon by the ALJ are not questioned in this appeal.

¹⁹ *Seigal v. Arizona State Liquor Board*, supra.

²⁰ *Webb v. State ex rel. Arizona Bd. of medical Examiners*, 202 Ariz. 555, 557, 48 P.3d 505, 507 (App. 2002).

²¹ Plaintiff's Opening Brief, pp 1-3

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a. Did the Director disregard the administrative record?

The question before this Court is whether the Director's decision is supported by substantial evidence in the record.²² If so, the Director's decision is valid. The Director is not required to address every finding in the administrative record, but need only "set out a written justification setting forth his or her reasons [for rejecting the ALJ's Decision]."²³ Here, the Director cites the following reasons for his decision to reject the ALJ Recommended Decision. First, the five monthly measurements at issue exceeded the number of events approved by ADEQ.²⁴ Although, pre-approval is not required, the pre-approval experience should indicate that additional monthly measurements might not be approved.

Next, the Director refers to the ADEQ LUST Site Characterization Manual ("LUST Manual") adopted and published in 1999.²⁵ The LUST Manual is intended to apprise owners and operators what corrective actions ADEQ's UST Corrective Action Section may find acceptable for reimbursement.²⁶ With respect to groundwater level measurements, the LUST Manual recommends that they be taken on a quarterly or even less frequent basis.²⁷ The LUST Manual was extant before Thompson's Muffler conducted the five monthly groundwater measurements at issue. The Director notes that the stated policy was to reject monthly water level measurements.

Next, the Director describes the process by which ADEQ reviewed Thompson's Site Characterization Work Plan and after having rejected monthly water level measurements twice, finally approved eight monthly measurements.²⁸ The Director notes that the approval of eight events did not suggest that further monthly measurements would be approved. On the contrary, the approval of eight events suggests additional measurements might not be approved.²⁹ The

²² See, *Smith v. Arizona Long Term Care System*, ___ Ariz. ___, 417 Ariz. Adv. Rep. 10, 84 P.3d 482, 485 (App. 2004). The reviewing "court determines only whether there is substantial evidence to support the administrative decision." When the Director rejects the ALJ Recommended Decision, the Director's decision is the final administrative decision.

²³ *Id.*

²⁴ Final Decision.

²⁵ ALJ Decision, Findings of Fact, ¶ 12.

²⁶ ALJ Decision, Findings of Fact, ¶ 12; Hearing Exhibit 2. "For State Assurance Fund (SAF) reimbursements, the UST Corrective Action Section will use [the] manual, site specific conditions, and the current or applicable statutes and rules to determine if UST corrective actions were reasonable and necessary."

²⁷ Final Decision. "With respect to the matters at issue in this appeal, the Lust Manual recommended that groundwater level measurements be taken no more than four times a year, or on a quarterly basis. Further, the Manual stated that water level measurements should be reduced to less than four times a year depending on site specific conditions. The manual also stated that extended periods of sampling were discouraged and generally not required by ADEQ."

²⁸ Final Decision, pp 1-2.

²⁹ Final Decision, p. 2. "Based on this transaction with ADEQ, Appellant knew that monthly water level measurements beyond those specifically approved were an activity which would not automatically be considered by ADEQ to be reasonable and necessary under A.R.S. § 49-1005(D)."

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Director concluded that based on its transactions with ADEQ, Thompson's Muffler should have known monthly measurements beyond the eight would not automatically be considered reasonable and necessary. The Director concluded that the evidence shows that monthly measurements were not reasonable or necessary under the specific circumstances of the site.³⁰

The Director did not disregard the record. He merely reached a different conclusion than the ALJ. Where "there is room for two opinions, the action is not arbitrary or capricious if exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached."³¹ In fact, the ALJ's Findings of Fact concede that monthly measurements at the Thompson's Muffler site did not provide any information that quarterly measurements did not provide.³² That finding supports a conclusion that monthly measurements at the site were not necessary.

The ALJ concluded that the five monthly measurements did not provide more information than quarterly ones, but that they should nonetheless be compensated because ADEQ "reversed its course" and changed "the rules in the middle of (or in reality, after) the project."³³ In other words, because ADEQ pre-approved eight monthly measurements, it was required to approve additional monthly measurements. The Director rejects that conclusion and explains that ADEQ's reluctant approval of eight events could not be construed to continue indefinitely.

The Director's Decision is the final administrative decision and is entitled to deference.³⁴ I find that the Director's Final Decision is supported by substantial evidence.

b. Did the Director misapply the law with respect to his reliance on the LUST guidelines?

Plaintiff contends that the Director improperly depended upon the Site Characterization manual.³⁵ Moreover, the ALJ concluded that ADEQ's denial of reimbursement for the five monthly measurements amounted to a change of agency policy without notice to those affected.³⁶ The Director referred to the LUST Manual and noted the recommendations in the manual including that extended periods of sampling were discouraged and generally not required. The LUST Manual was issued on January 15, 1999, before the five monthly groundwater level measurements at issue were conducted in 2000 and 2001. The Plaintiff's contacts with ADEQ in 1999 for pre-approval of the eight monthly groundwater level measurements were also held before the five measurements at issue were conducted. The Director concluded that because of

³⁰ Final Decision, p. 2.

³¹ *Patras v. Arizona State Liquor Board*, 129 Ariz. 449, 452, 631 P.2d 1107, 1110 (App. 1981).

³² ALJ Decision, Findings of Fact, ¶31.

³³ ALJ Decision, Findings of Fact, ¶¶ 31, 32, Conclusions of Law, ¶ 7.

³⁴ *Smith v. Arizona Long Term Care System*, ---Ariz.---, 84 P.3d at 485.

³⁵ Plaintiff's Opening Brief, pp. 20-22.

³⁶ ALJ Decision, Findings of Fact, ¶¶ 15, 32, Conclusions of Law, ¶ 4, 5.

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the LUST Manual and Plaintiff's transactions with ADEQ, Plaintiff should not have had an expectation of continued approval of monthly measurements. The Director did not rely on the LUST Manual as controlling with respect to reimbursement for the five monthly measurements at issue.³⁷ Instead, after reviewing the record, he was persuaded that monthly measurements were not reasonable or necessary under the specific circumstances of the site.³⁸

c. Did the Director adequately justify his decision?

The Director is required "to accept, reject or modify the ALJ recommended decision."³⁹ If he rejects the ALJ's decision, he is required to serve all parties with a copy of the ALJ decision with the rejection and "a written justification setting forth the reasons for the rejection or modification."⁴⁰ The statute does not require findings of fact or conclusions of law. "The agency head need only set out a written justification setting forth his or her reasons."⁴¹ "In reviewing factual determinations, the court determines only whether there is substantial evidence to support the administrative decision."⁴² "A decision supported by substantial evidence may not be set aside as being arbitrary and capricious."⁴³ Moreover, when the Director's decision rejects or modifies the ALJ Decision, "the Director's decision is the final administrative decision entitled to deference."⁴⁴ This Court finds that the Director adequately justified his decision.

4. Conclusion

The only question before this Court in this administrative appeal is whether the Director's Decision is supported by substantial evidence. "The trial court cannot re-weigh the evidence and substitute the court's findings for that of the agency."⁴⁵ The Director did not rely on the agency LUST Manual in determining the question of reimbursement of the five claims at issue on the appeal. The Director concluded that the evidence showed that the monthly measurements at issue were not reasonable or necessary under the specific circumstances of the site. This Court finds that the Director's Decision is supported by substantial evidence and meets the statutory requirement that he set forth his reasons for rejecting the ALJ Decision.

³⁷ The ALJ found and the Plaintiff argues extensively that ADEQ violated several statutory provisions when it changed its policy with respect to monthly measurements. The ALJ and Plaintiff fail to distinguish between the reimbursement process for a particular claim and the promulgation of policy by the agency. Here the agency merely evaluated claims for reimbursement with respect to five monthly measurements. It did not establish agency policy or change policy. The statutory provisions advanced by Plaintiff are simply *inapposite.

³⁸ Final Decision, p. 2.

³⁹ A.R.S. § 41-1092.08(B).

⁴⁰ *Id.*

⁴¹ *Smith v. Arizona Long Term Care System*, ___ Ariz. ___, 84 P.3d 485. In *Smith*, the agency Director rejected the ALJ recommended decision.

⁴² *Woerth v. City of Flagstaff*, 167 Ariz. 412, 417, 808 P.2d 297, 302 (App. 1990).

⁴³ *Smith v. Arizona Long Term Care System*, ___ Ariz. ___, 84 P.3d at 485.

⁴⁴ *Id.*

⁴⁵ *Plowman v. Ariz. St. Liquor Bd.*, 152 Ariz. 331, 335, 732 P.2d 222, 226 (App. 1986).

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IT IS THEREFORE ORDERED denying the relief requested by the Plaintiff in this case.

IT IS ORDERED affirming the decision of the ADEQ Director in this case.

IT IS FURTHER ORDERED that counsel for the Defendant shall lodge an order and judgment consistent with this minute entry opinion no later than May 5, 2004.